(1)

FILED

No. 97-448 SEP 10 1997

IN THE

Supreme Court of the United States

October Term, 1997

ABDUL RASHID,

Petitioner,

v.

MARINE MIDLAND BANK f/k/a
MARINE MIDLAND BANK, N.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The New York Civil Practice Law and Rules, as does the Federal Rules of Civil Procedure, provides that a motion for summary judgment may not be granted if the opponent shows that there are triable issues of fact and the movant is not entitled to judgment as a matter of law.

The Supreme Court of the State of New York held that despite the factual showing of defenses presented by the party resisting summary judgment, there were no triable issues of fact, and awarded summary judgment to the plaintiff, the party making the motion.

The question thus presented is: When a trial level court disregards the fundamental rule of summary judgment, and grants summary judgment to the plaintiff-movant, thus depriving the defendant-opponent of his opportunity to present his case to the trier of fact, is the party opposing the motion deprived of his property in violation of due process of law?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

GROUNDS ON WHICH JURISDICTION IS INVOKED ... 2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 12

INDEX TO APPENDIX

Appendix A—Decision and Order of the Supreme Court of the State of New York, County of Dutchess, Entered August 25, 1995 ..... 1a

Appendix B—Opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, Entered August 12, 1996 ..... 5a

Appendix C—Decision Slip and Order of New York Court of Appeals Entered November 19, 1996 ..... 7a

Appendix D—Judgment of Foreclosure and Sale of Supreme Court of the State of New York, County of Dutchess, Dated February 3, 1997 ..... 9a

Appendix E—Decision Slip and Order of the New York Court of Appeals dated June 12, 1997 ..... 19a

TABLE OF AUTHORITIES

Page

Cases:

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) .. 9, 10

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 7

Boddie v. Connecticut, 401 U.S. 371 (1971) 10

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9

Esteve v. Abad, 271 App. Div. 725, (1st Dept. 1947) 8

Jenkins v. McKeithen, 395 U.S. 411 (1969) 9

Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18 (1981) 11

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 9

Mathews v. Eldridge, 424 U.S. 319 (1976) 10

Perry v. Leeke, 488 U.S. 272 (1989) 9

PruneYard Shopping Center v. Robbins, 447 U.S. 85 (1980) . 3

Richards v. Jefferson County, Ala., ___ U.S. ___, 116 S. Ct. 1761 (1996) 3

Santosky v. Kramer, 455 U.S. 745 (1982) 11

Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957) 8

Statutes and Other Authorities:

Hamilton, The Federalist No. 78 8

N.Y. C.P.L.R. 3212 ..... 3, 10

N.Y. C.P.L.R. 3212(b) 3, 8

28 U.S.C. § 1257(a) 3

U.S. Constitution, Amendment Six 9

U.S. Constitution, Amendment 14 3

5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974) 9

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ABDUL RASHID,

Petitioner,

-against-

MARINE MIDLAND BANK f/k/a
MARINE MIDLAND BANK, N.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

Petitioner, Abdul Rashid, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, entered on August 19, 1996, which unanimously affirmed an order of the Dutchess County Supreme Court entered August 25, 1995.

OPINIONS BELOW

The Supreme Court of the State of New York, County of Dutchess (Beisner, J.), granted the motion of plaintiff-respondent Marine Midland Bank f/k/a Marine Midland Bank, N.A. *Marine Midland Bank v. Rashid* (hereafter sometimes "Marine Midland" or "the bank") for summary judgment. (Decision and order entered August 25, 1995, attached as Appendix A.)

The Appellate Division, Second Department, affirmed Dutchess County Supreme Court. *Marine Midland Bank v. Rashid*, 230 A.D.2d 776, 646 N.Y.S.2d 621 (August 12, 1996). (Appendix B.)

Petitioner's motion for leave to appeal to the New York Court of Appeals was dismissed as nonfinal on November 19, 1996. (Appendix C.) *Marine Midland Bank v. Rashid*, 89 N.Y.2d 860, 653 N.Y.S.2d 282.

Respondent moved that a referee's report dated May 24, 1996 be ratified and confirmed. The Dutchess County Supreme Court granted that application and issued a Judgment of Foreclosure and Sale, dated February 3, 1997. (Appendix D.)

The matter now being final, petitioner again moved for leave to appeal to the New York Court of Appeals. That motion was denied on June 12, 1997. (Appendix E.) *Marine Midland Bank v. Rashid*, __ N.Y.2d __, __ N.Y.S.2d __.

JURISDICTION

The New York Supreme Court, Appellate Division, Second Department, affirmed the Dutchess County Supreme Court on

August 12, 1996. Petitioner's motion for leave to appeal to the Court of Appeals was denied (on the merits) on June 12, 1997. This petition is timely made within ninety days of the date of the Court of Appeals' determination. Jurisdiction is invoked pursuant to 28 USC § 1257(a).

The issue presented here was raised in opposition to the motion for summary judgment in the New York Supreme Court and was presented to the New York Court of Appeals in petitioner's motions to that court for leave to appeal, and is thus preserved for this Court's review. See *Richards v. Jefferson County, Ala.*, __ U.S. __, 116 S.Ct. 1761, 1765 n. 3 (1996); *PruneYard Shopping Center v. Robbins*, 447 U.S. 85, 87, n. 9 (1980).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law . . .

New York Civil Practice Law and Rules, Rule 3212 provides in relevant part:

> (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the

> cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor or any party . . . the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact . . .

STATEMENT OF THE CASE

In 1988 petitioner commenced a small condominium project. He obtained financing from respondent Marine Midland, with which he had had a long-term business relationship. Respondent confirmed to petitioner its commitment to provide financing and to grant him favorable terms. In July, 1989, with the project progressing, respondent increased the indebtedness from $1,200,000 to $1,900,000 in a grid note, with the additional indebtedness secured by PepsiCo stock owned by petitioner, which stock was to be released as collateral after the loan was reduced to the initial $1,200,000. In February, 1990 the financing terms were revised again and the credit line was increased to $1,900,000 with the condominium project itself as sole security; additional amounts could be borrowed against PepsiCo stock at 70% of market value.

In June of 1990, petitioner was summoned to the local Marine Midland office and a senior Marine Midland officer, in the presence of the loan officer, told petitioner that the bank wanted to terminate the agreement. The senior officer made various threats against petitioner. At this time the condominium project was half finished, nevertheless Marine Midland cut off defendant's credit and froze his collateral even though petitioner

was in full compliance with all agreements and the loan was current.

Later that year the bank forced petitioner to provide more collateral, his personal residence and additional PepsiCo stock, and reduced his line of credit. He was forced to sign new loan agreements, one, a mortgage for $1,200,000 which was collateralized with the condominium project, and another, a grid note, which was secured by defendant's residence and PepsiCo stock. Petitioner did not want to cross-collateralize these loans and the bank agreed in a letter dated November 2, 1990.

The bank soon abrogated the revised loan agreement, cut off petitioner's credit and froze his collateral. In January 1993 petitioner tendered the full amount due on the grid note but, in violation of the parties' agreement the bank would not release the collateral on the grid note. After almost one year of harassment on the part of the bank, in November 1993 the bank coerced petitioner to sign a new loan agreement. He paid the bank $755,000, the entire amount due on the grid note, and the bank released the stock but not his house.

In the summer of 1994, with the local housing market in a depressed state, for the first time petitioner could not keep up with debt service on the loan. In January 1995 the bank commenced this foreclosure action against both the condominium project and defendant's residence.

Contesting the foreclosure action, petitioner presented a number of affirmative defenses and counterclaims, including unconscionable conduct with respect to the bank's customer.

Petitioner's verified answer alleged, in his first affirmative defense, that respondent bank had unjustly and unreasonably

inflated the indebtedness owed, and acted intentionally, arbitrarily and capriciously and with intent to eliminate petitioner's equity in the condominium project and to inflict serious financial hardship on petitioner. In a second affirmative defense, petitioner laid out the history of the relationship between the bank and himself and alleged that the bank had acted in bad faith, that the bank's bad faith and misconduct were intended to cause injury and financial ruin, that the bank should be estopped from foreclosure, and that it was seeking equitable relief with unclean hands. In a third affirmative defense petitioner urged that any final judgment of foreclosure provide that the project parcel be sold first and only if the market value of that parcel be less than the proven indebtedness should the sale of petitioner's residence be permitted.

In counterclaims, petitioner alleged, *inter alia,* that respondent acted in bath faith, that its conduct was unconscionable, and that respondent had committed intentional and negligent tortious acts, causing financial, physical and mental damages to petitioner.

In an affidavit in opposition to the bank's summary judgment motion, petitioner conceded that there were notes and mortgages on the condominium project and his residence, but showed that there were oral promises and additional written agreements which modified and supplemented the documents respondent sought to enforce. Petitioner reviewed the history of the matter, including his long relationship with respondent, showing how after changes in management and personnel, respondent abrogated its agreements with petitioner and unilaterally changed the long term method of operating that the parties had established. Petitioner showed that he had several good affirmative defenses and counterclaims that he should be permitted to prove in court, the facts of which should be heard

by a trier of fact and which acted as good defenses to respondent's allegations.

An affirmation from petitioner's counsel explained the parties' long term relationship and the course of dealing between the parties, both before and after that relationship went sour. Counsel showed how the new agreement was coerced by Marine Midland. He documented respondent's long and calculated course of action to force petitioner into default.

Both the affidavit of petitioner and the affirmation of his attorney were accompanied by documentary exhibits to support petitioner's contentions and show that there were issues of fact that should be tried by a trier of fact.

Supreme Court, Dutchess County rejected consideration of petitioner's evidence and granted summary judgment. The Appellate Division, Second Department affirmed on the decision of Supreme Court.

The Court of Appeals dismissed petitioner's first motion for leave to appeal on the ground of nonfinality. After Supreme Court issued a judgment of foreclosure and sale, a renewed motion for leave to appeal was made and that motion was denied on June 12, 1997.

REASONS FOR GRANTING THE WRIT

Summary judgment is becoming an ever-more-frequently used procedural tool in both the State and Federal courts. Its basic principles are well understood, i.e., that the motion should be granted when the evidence is such that it would require a directed verdict for the moving party, but it should be denied when the papers show that there are facts sufficient to require a

trial on any issue of fact. The court's role is well understood to be that of issue finding, not issue resolving. C.P.L.R. 3212(b); *Anderson v. Liberty Lobby,* 477 U.S. 242, 250-252 (1986); *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 404 (1957); *Esteve v. Abad,* 271 App. Div. 725, 727 (1st Dept. 1947).

In the case at bar New York Supreme Court did not apply the well accepted rules. The court rejected the showing made in the affidavits and exhibits presented by petitioner and found there were no questions of fact. The court closed its eyes to the factual issues presented and summarily awarded judgment to respondent. That deprived petitioner of his day in court, his opportunity to present his facts to a trier of fact. This despite the fact that a large investment was at stake including the substantial amount of savings petitioner had invested in the condominium project and the collateral represented by petitioner's home.

When a court uses summary judgment as an arbitrary vehicle for depriving a party of a trial on the facts, that party is denied due process of law. The improper granting of summary judgment presents important questions of federal constitutional law which have not been, but should be, considered by this Court.

It has long been recognized that arbitrary determinations of a court were dangerous and antithetical to sound administration of justice. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . ." Hamilton, The Federalist No. 78.

This Court has recognized that summary judgment "must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury . . ." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). Due process requires that there be an opportunity to present every available defense." *American Surety Co. v. Baldwin,* 287 U.S. 156, 168 (1932).

While a civil litigant is not entitled to a hearing on the merits in every case, *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 437 (1982), due process is denied when there are factual issues that, if presented to a trier of fact, could result in a determination contrary to that awarded by the summary judgment court.

A summary judgment motion is decided on the papers. It is impossible to question an affiant as one might cross examine a witness at trial. While the right to cross examine is specified in the Sixth Amendment with respect to criminal trials, the importance of the ability to cross examine a witness is not confined to criminal cases. This Court has frequently emphasized that "the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins v. McKeithen,* 395 U.S. 411, 428 (1969).

Cross examination has been characterized as "the greatest legal engine ever invented for the discovery of truth" (5 Wigmore, Evidence § 1367 [Chadbourn rev. 1974], cited in *Perry v. Leeke,* 488 U.S. 272, 283, n. 7 [1989]). A shortcut to termination of the litigation that bypasses this engine for the discovery of truth must be scrutinized carefully. This is especially true when the defendant, against whom the case is brought, is denied the possibility of cross examining the witnesses for the plaintiff, the party that has affirmatively

commenced the litigation and wishes to affect the property rights of the defendant.

Wrongful granting of summary judgment, contrary to the accepted rules concerning such motions, is a denial of due process. Procedural due process rules are meant to prevent the unjustified deprivation of property. They are meant to minimize the risk of error that results in erroneous deprivation of property. *Mathews v. Eldridge,* 424 U.S. 319, 344 (1976).

This due process consideration is especially important when the party moving for summary judgment is the party that commenced the litigation. The defendant must be provided the opportunity to present to the trier of fact every available defense. *See, American Surety Co. v. Baldwin,* 287 U.S. 156, 168 (1932). The defendant is not a voluntary participant in the litigation. Persons forced to have a claim determined in a court of law must be given a meaningful opportunity to be heard. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971).

It is not sufficient that the state legislature has provided a rule[1] and the state courts have stated principles holding that summary judgment should not be granted if the opponent demonstrates that there are triable issues of fact. If followed C.P.L.R. 3212 and New York's body of case law would have resulted in respondent's motion for summary judgment being denied and petitioner therefore not having been deprived of due process. When a judge ignores such rules and case guidelines and still grants summary judgment, terminating the lawsuit and resulting in a judgment depriving a party of a great deal of

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[1]The C.P.L.R. is composed of "rules" and "sections," both of which have force of law; C.P.L.R. 3212 is designated a "rule."

property, the consequences are the same as if there were no statute and case law that ostensibly provide for due process.

This constitutional insult is not mitigated by the fact that the State of New York provides for one as-of-right and one permissive level of appellate review. It is commonplace that the Appellate Division will rubber-stamp the result of the lower court. Furthermore, the Court of Appeals, like this Court, cannot possibly review all cases which were decided incorrectly (denial of leave to appeal has no precedential value). The determination of the Court of Appeals does not establish that there was no deprivation of due process; this Court has disagreed with the constitutional assessments of the New York Court of Appeals. *See e.g., Santosky v. Kramer,* 455 U.S. 745 (1982).

Even if, *arguendo,* New York's summary judgment rules, as applied, meet minimal standards of judicial fairness, that does not end the inquiry. "A wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter v. Department of Social Services of Durham County, N.C.,* 452 U.S. 18, 33 (1981).

The decision of New York Supreme Court, affirmed by the Appellate Division, does not comport with the principles that have been enunciated by this Court respecting due process in the administration of civil lawsuits. In order for summary judgment to be granted, it must be clear that there is no triable issue of fact, no fact that if presented to a jury could result in a finding for the party opposing summary judgment. Granting summary judgment in the face of such evidence and awarding a judgment that permits the respondent to deprive petitioner of his property, is a deprivation of due process.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted. In the event that the Petition is granted, petitioner urges that the order of the Appellate Division, Second Department be reversed.

Dated: September 10, 1997

Respectfully submitted,

ROBERT M. COHEN
7 Stonegate Road
Ballston Lake, New York 12019
(518) 877-5552
Appellate Counsel for Petitioner

APPENDIX A—Decision and Order of the Supreme Court of the State of New York, County of Dutchess, Entered August 25, 1995

Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

MARINE MIDLAND BANK f/k/a MARINE MIDLAND BANK, N.A.

Plaintiff,

-against-

Index No: 95/178

ABDUL RASHID AND JANE DOE AND JOHN DOE,

Defendants.

BEISNER, J.

THE FOLLOWING PAPERS READ ON THIS MOTION by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor and against defendants, striking defendant's affirmative defenses and counterclaims, and appointing a referee to compute

	PAPERS NUMBERED
NOTICE OF MOTION/ORDER TO SHOW CAUSE/AFFIDAVITS.....	1-2, 1-11, 1-5

EXHIBITS.....	1-8
MEMORANDUM OF LAW	1-23
ANSWERING AFFIDAVITS.....	1-8; 1-16; 1
EXHIBITS.....	1-7; A-I
MEMORANDUM OF LAW	1-9
REPLYING AFFIDAVITS.....	1-11
EXHIBITS.....	1-9
MEMORANDUM OF LAW	1-9
AFFIDAVITS.....	
EXHIBITS.....	

UPON THE FOREGOING PAPERS IT IS ORDERED THAT THIS MOTION by plaintiff for an order pursuant to CPLR 3213 granting summary judgment in its favor and against defendants is granted and defendants' affirmative defenses and counterclaims are dismissed.

Settle order providing for the appointment of a referee to compute to be designated by the court.

This is an action to foreclose two mortgages on real property, one on a condominium project in the Town of Beekman and the other a collateral security second mortgage on defendant Rashid's residence. On November 2, 1993, after several months of negotiation during which both parties were represented by counsel, plaintiff and defendant Rashid entered into two agreements, a Mortgage Modification and Extension Agreement and a Mortgage Reduction and Modification Agreement. The first Agreement pertained to the condominium project and the second Agreement pertained to the collateral security mortgage on Rashid's residence.

Defendant's answer admits the failure to make monthly interest and principal payments since July 1994 and the failure

to pay 1994-1995 school taxes. Defendant also admits receipt of plaintiff's acceleration notice.

By proof of the execution of the notes and mortgages and the failure to make payment according to their terms, plaintiff has established prima facie its right to summary judgment. (*See Federal Deposit Insurance Corp. v. Jacobs,* 185 AD2d 913.) In order to defeat this motion, defendant must show facts sufficient to require a trial of any issue of fact. (CPLR 3212[b]; *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067.)

In opposition to this motion, defendant contends that plaintiff has violated its implied obligation to deal honestly and in good faith with its customer, and has engaged in conduct that is fraudulent, oppressive and unconscionable. Defendant places great reliance on two documents. The first is a November 2, 1990 letter from plaintiff's attorney advising defendant that if his indebtedness is reduced below $370,000, the collateral security lien shall be reduced proportionately. The second is a July 18, 1989 stock pledge agreement securing a $700,000 credit line with a pledge of stock.

Both of these documents antedate the November 2, 1993 Modification Agreements in which defendant reaffirmed the validity of the mortgage liens and agreed that there were no defenses nor offsets to the mortgages or the indebtedness secured thereby. Defendant is bound by this waiver. (*See Central Funding Co. v. Deglin*, 67 AD2d 673; *affd* 48 NY2d 964; *see also Barclays Bank of New York, N.A. v. Heady Electric Co., Inc.*, 174 AD2d 963.) Defendant's attempts to contradict or modify the terms of these Agreements are barred by the parol evidence rule (*Marine Midland Bank-Southern v. Thurlow*, 53 NY2d 381, 387).

For the reasons stated in the foregoing paragraph, defendant's second affirmative defense and first, second, third, fourth and sixth counterclaims must be dismissed. Defendant's first

affirmative defense, that plaintiff refused to accept a deed in lieu of foreclosure, is not a defense to this action (*Albany Savings Bank, F.S.B. v. Novak*, 151 Misc2d 956). Defendant's third affirmative defense, a request that the parcels be sold separately, is not a defense to liability, and the manner and order of sale will be determined after the referee's report has been filed. Finally, defendant's fifth counterclaim, alleging defamation, fails to state a cause of action (CPLR 3016; *see Mahoney v. Adirondack Publishing Co.*, 71 NY2d 31).

Because defendant has failed to raise any issue of fact, plaintiff's motion is granted.

Dated: August 25, 1995

s/RALPH A. BEISNER
RALPH A. BEISNER, J.S.C.

TO: McCabe & Mack, Esqs.
Attorneys for Plaintiff
63 Washington Street P.O. Box 509
Poughkeepsie, New York 12602-0509

Corbally, Gartland and Rappleyea, Esqs.
Attorneys for Defendant Rashid
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Poughkeepsie, New York 12601

FILED AND ENTERED
ON AUG. 25 1995
DUTCHESS
COUNTY CLERK

APPENDIX B—Opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, Entered August 12, 1996

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

____AD2d____ 3750Z
B/hu

GUY JAMES MANGANO, P.J. Argued - June 6, 1996
SONDRA MILLER
THOMAS R. SULLIVAN
ANITA R. FLORIO, JJ.

95-09017

Marine Midland Bank f/k/a Marine Midland Bank, N.A., respondent, v Abdul Rashid, appellant, et al., defendants. DECISION & ORDER

Corbally, Gartland & Rappleyea, Poughkeepsie, N.Y. (Fred W. Schaeffer of counsel), for appellant.

McCabe & Mack, LLP, Poughkeepsie, N.Y. (Richard R. Du Vall and Jace D. McKeighan of counsel), for respondent.

Appeal by the defendant Abdul Rashid from an order of the Supreme Court, Dutchess County (Beisner, J.), entered August 25, 1995.

ORDERED that the order is affirmed, with costs, for reasons stated by Justice Beisner at the Supreme Court.

MANGANO, P.J., MILLER, SULLIVAN and FLORIO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

August 12, 1996
MARINE MIDLAND BANK f/k/a MARINE MIDLAND BANK, N.A. v RASHID

APPENDIX C—Decision Slip and Order of the New York Court of Appeals, Entered November 19, 1996

State of New York
Court of Appeals

Clerk's Office
Albany, New York 12207

DECISION November 19, 1996

2-10 Mo. No. 1406
Marine Midland Bank f/k/a Marine Midland Bank, N.A.,
Respondent,
V.
Abdul Rashid,
Appellant,
et al.,
Defendants.

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of November 1996

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 1406
Marine Midland Bank f/k/a Marine Midland Bank, N.A.,

Respondent,

v.
Abdul Rashid,

Appellant,

et al.,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

s/Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX D—Judgment of Foreclosure and Sale of Supreme Court of the State of New York, County of Dutchess, Dated February 3, 1997

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

----------X

MARINE MIDLAND BANK f/k/a MARINE MIDLAND BANK, N.A.,

Plaintiff,

-against-

ABDUL RASHID,

Defendant.

----------X

JUDGMENT OF FORECLOSURE AND SALE

Index No: 95/178

Assigned Judge: Hon. Ralph A. Beisner

ON THE SUMMONS, VERIFIED COMPLAINT and Notice of Pendency of Action duly filed in this action on January 12, 1995, and all proceedings thereon, and on reading and filing the Affirmation of Regularity of Richard R. Du Vall, Esq., dated May 23, 1995, and showing that each and all of the defendants herein have been duly personally served with the Summons and Complaint in this action, or have voluntarily appeared therein by their respective attorneys,

And proving that more than thirty days had elapsed since said defendants were so served and appeared as aforesaid,

And that the defendant has served an answer to said Complaint, and has appeared by Corbally, Gartland & Rappleyea, Esqs.,

And that this Court, by Order dated August 25, 1995, awarded summary judgment to the plaintiff,

And that the Complaint herein and due notice of the pendency of this action containing all the particulars required to be stated therein were duly filed in the Office of the Clerk of the County of Dutchess on January 12, 1995, and at or after the time of filing the Complaint, and an Order of Reference having been duly made to compute the amount due to the plaintiff upon the Note and Mortgages set forth in the Complaint and to examine and report whether the mortgaged premises can be sold in parcels, and to take proof of the facts and circumstances stated in the Complaint and to examine the plaintiff as to any payments which were made on the mortgage indebtedness, and the said report having been made,

And on reading and filing the report of James E. Nelson, Esq., the Referee named in said Order, by which report, bearing the date the 24th day of May, 1996, it appears that the sum of $897,260.88 was due thereon on January 10, 1996; and that the mortgaged premises should be sold in two parcels and the facts and circumstances stated in said Complaint are true and that no payments were made to the plaintiff or to any person for its use which have not been credited on account of the obligation mentioned in the Complaint;

And on plaintiff's motion dated July 30, 1996, defendant's responding papers and plaintiff's reply papers, and this Court having held a hearing on plaintiff's request for legal fees on December 18, 1996;

Now upon proof of due notice of this application for judgment upon all parties who are entitled thereto, as shown by the aforesaid Affirmation of Regularity of Richard R. Du Vall, Esq.,

ON MOTION OF McCABE & MACK, attorneys for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED that the said report of the said Referee, be, and the same is hereby in all respects ratified and confirmed; and it is

ORDERED, ADJUDGED AND DECREED that the mortgaged premises described in Exhibit "B" to the Referee's Report (referred to in this action as the condominium premises), and as hereinafter described, (Schedule "A" annexed hereto), be sold in a single parcel at public auction at the lobby of the Dutchess County Courthouse, 10 Market Street, in the County of Dutchess, State of New York, by and under the direction of James E. Nelson, Esq., who is hereby appointed Referee for that purpose; that the said Referee give public notice of the time and place of such sale according to law and the practice of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff may make application to this court, within 90 days of the delivery of the Referee's Deed to the purchaser of the condominium premises (or sooner, if plaintiff so elects) for an Order fixing the deficiency, if any, applying the standards set forth in RPAPL §1371, and that upon such application, the Court determines that a deficiency exists, then the property described in Exhibit "E" to said Referee's Report (Schedule "B" hereto), shall be thereafter sold by said Referee, according to the laws and practices of this Court;

That the plaintiff or any other parties to this action may become the purchaser(s) at such sale(s); that in case the plaintiff shall become the purchaser(s) at the same sale(s), it shall not be required to make any deposit thereon; that the premises be sold subject to real property taxes, assessments and water rates which are or may become liens on the premises at the time of sale with such interest or penalties; that said Referee execute to the purchaser or purchasers on such sale a deed or deeds of the premises sold; that the said Referee deposit the balance of said proceeds in the Referee's own name as Referee in Poughkeepsie

Savings Bank and shall thereafter make the following payments and the Referee's checks drawn for that purpose shall be paid by the said depository:

FIRST: The statutory fees of said Referee, not to exceed $200. For each such sale.

SECOND: The expense of the sale(s), not including transfer stamps or recording fees, which shall be borne by the purchaser(s), and the advertising expenses as shown on the bills presented and certified by said Referee to be correct duplicate copies of which shall be filed with the said Referee's Report of Sale herein.

THIRD: Said Referee shall also pay to the plaintiff or its attorney the sum as taxed by the clerk adjudged to the plaintiff for costs and disbursements in this action, with interest thereon from the date hereof, together with an additional allowance of $300.00 hereby awarded to the plaintiff in addition to costs with interest thereon from the date hereof; and also $897,260.88, the said amount so reported due as aforesaid, together with the legal interest thereon from January 10, 1996, or so much thereof as the purchase money of the mortgaged premises will pay of the same, plus such expenditures for taxes, insurance and the like which plaintiff shall have made since January 10, 1996, for which plaintiff shall have provided the Referee to sell with proof, and the sum of $25,479.50 hereby allowed to the plaintiff for attorney's fees. Plaintiff may at any time move this Court for an additional award of fees, based upon services rendered after December 18, 1996, other than in the ordinary course of a single-parcel foreclosure action.

FOURTH: If such Referee intends to apply for further allowance for his fees, he may leave upon deposit such amount as will cover such additional allowance to await the further Order of the Court thereon after the application duly made.

That in case the plaintiff be the purchaser of said mortgaged premises at said sale(s), or in the event that the rights of the

purchaser at said sale(s) and the terms of sale under this judgment shall be assigned to and be acquired by the plaintiff, and a valid assignment thereof filed with said Referee, said Referee shall not require the plaintiff to pay in cash the entire amount bid at said sale(s), but shall execute and deliver to the plaintiff a Deed or Deeds of the premises sold upon the payment to said Referee of the amounts specified above in items marked "FIRST" and "SECOND" and the balance of the amount bid, after deducting therefrom the aforesaid amounts paid by the plaintiff, for Referee's fees and advertising expenses, shall be allowed to the plaintiff and applied by said Referee upon the amounts due to the plaintiff as specified above in item marked "THIRD"; that if after applying the balance of the amount due to the plaintiff, the plaintiff shall pay, to said Referee, upon delivery to plaintiff of said Referee's deed(s), the amount of such surplus; that said Referee on receiving said several amounts from plaintiff shall then deposit the balance.

That, said Referee take the receipt of the plaintiff or plaintiff's attorney for the amounts paid as hereinbefore directed in item marked "THIRD" and file it with his Report of Sale; that he deposit the surplus monies, if any, with the Dutchess County Commissioner of Finance within five days after the same shall be received and be ascertainable, to the credit of this action, to be withdrawn only on the Order of the Court, signed by a Judge of the Court; that the said Referee make his report of such sale under oath showing the disposition of the proceeds of the sale(s) and accompanied by the vouchers of the persons to whom payments were made and file it with the Clerk of the County of within thirty days after completing the sale(s) and executing the proper conveyance(s) to the purchaser(s) and that if the proceeds of such sale be insufficient to pay the amount reported due to the plaintiff with interest and costs aforesaid, the plaintiff recover from the defendant, Abdul Rashid, the whole deficiency or so much thereof as the Court may determine to be just and

equitable of the residue of the mortgaged debt remaining unsatisfied after a sale of the mortgaged premises and the application of the proceeds thereof, provided a motion for a deficiency judgment shall be made as prescribed by Section 1371 of the Real Property Actions and Proceedings Law within the time limited therein, which time shall not commence until the delivery of the Referee's Deed of the second parcel sold, if same shall be necessary, and the amount thereof is determined and awarded by an Order of this Court as provided for in said Section; and it is further

ORDERED, that the purchaser or purchasers at said sale(s) be let into possession on production of the Referee's deed or deeds; and it is further

ORDERED, ADJUDGED AND DECREED, that each and all of the defendants in this action and all persons claiming under them or any of them, after the filing of such Notice of Pendency of this action, be and they are hereby forever barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the said mortgaged premises and each and every part thereof.

FOLLOWING is a description of the said mortgaged premises hereinbefore mentioned:

SEE SCHEDULES "A" AND "B" ANNEXED HERETO

SUBJECT to all accrued unpaid real property taxes, assessments and water rates which are or may become liens on the premises and the penalties and interest thereon, if any, and any other rights, liens or interest of record, and, with respect to the Schedule "B" premises only, subject to a first mortgage given by defendant to plaintiff, recorded in Liber 1219 of Mortgages at page 61, and a further mortgage recorded in Liber 1255 of Mortgages at page 26, which two mortgages were thereafter consolidated.

ENTER

DATED: Poughkeepsie, New York
2/3/97

RALPH A. BEISNER
HON. RALPH A. BEISNER

McCABE & MACK LLP
Attorneys for Plaintiff
Office and P.O. Address
63 Washington Street
P. O. Box 509
Poughkeepsie, NY 12602
(914) 452-2800

SCHEDULE "A"

ALL THAT CERTAIN plot, piece or parcel of land, situate, lying and being in the Town of Beekman, County of Dutchess and State of New York, bounded and described as follows:

BEGINNING at a steel pin set marking the northwest corner of the herein described parcel, said steel pin marking the division line of the lands of Philip A. Woll on the north and the lands of Abdul Rashid on the south with the easterly line of Lime Ridge Road; thence along the said division line the following 6 courses and distances:

N 29° 59' 10" E 159.81 feet, N 18° 49' 50" E 48.36 feet, N 11° 54' 30" E 37.07 feet, N 16° 45' 00" e 82.84 feet, N 25° 15' 00" E 407.50 feet, and N 23° 13' 20" E 22.52 feet to a steel pin set marking the most northerly point of the herein described parcel; thence southerly along the westerly line of lands of Emmadine Land Association the following 5 courses and distances: S 10° 47' 10" W 20.15 feet, S 17° 58' 00" E 472.07 feet, S 15° 59' 20" E 107.78 feet, S 22° 06' 00" E 53.59 feet, and S 18° 00' 50" E 217.62 feet to a steel pin marking the southeast corner of the herein described parcel; thence through the lands of Abdul Rashid S 77° 54' 51" W 597.25 feet to a point on the easterly road line of Lime Ridge Road; thence along said road line (old road line) N 01° 26' 30" W 112.00 feet and N 06° 45' 20" E 154.16 feet to the point or place of beginning. Containing 6.6053 acres of land.

EXCEPTING and reserving from said parcel all that parcel conveyed to the Town of Beekman for road improvements and described as follows:

BEGINNING at a steel pin set marking the northwest corner of the herein described, said steel pin marking the division line of the lands of Woll on the north and the lands of Rashid on the south with the easterly line of Lime Ridge Road, thence along the said division line N 29° 59' 10" E 21.55 feet to the new

easterly road line, thence southerly along the new road line S 6° 45' 20" W 173.30 feet and S 1° 26' 30" W 109.85 feet to a steel pin set marking the true southwest corner of the herein described parcel; thence through the lands of Rashid S 77° 54' 51" W 8.66 feet to the point on the old easterly road line of said Lime Ridge Road; thence along said old road line N 1° 26' 30" W 112.00 feet and N 6° 45' 20" W 154.16 feet to the point or place of beginning.

SCHEDULE "B"

ALL that certain lot, piece or parcel of land situate, lying and being in the Town of Beekman, County of Dutchess and State of New York, bounded and described as follows:

BEGINNING at a steel pin set marking the northwest corner of the herein described parcel, said steel pin marking the division line of the lands of Philip A. Woll on the north and the lands of Abdul Rashid on the south with the easterly line of Lime Ridge Road; thence along the said division line the following 6 courses and distances: N 29° 59' 10" E 159.81 feet, N 18° 49' 50" E 48.36 feet, N 11° 54' 30" E 37.07 feet, N 16° 45' 00" E 82.84 feet, N 25° 15' 00" E 407.50 feet, and N 23° 13' 20" E 22.52 feet to a steel pin set marking the most northerly point of the herein described parcel; thence southerly along the westerly line of lands of Emmadine Land Association the following 5 courses and distances: S 10° 47' 10" W 20.15 feet, S 17° 58' 00" E 472.07 feet, S 15° 59' 20" E 107.78 feet, S 22° 06' 00" E 53.59 feet, and S 18° 00' 50" E 217.62 feet to a steel pin marking the southeast corner of the herein described parcel; thence through the lands of Abdul Rashid S 77° 54' 51" W 597.25 feet to a point on the easterly road line of Lime Ridge Road; thence along said road line (old road line) N 01° 26' 30" W 112.00 feet and N 06° 45' 20" E 154.16 feet to the point or place of beginning. Containing 6.6053 acres of land.

EXCEPTING and reserving from said parcel all that parcel conveyed to the Town of Beekman for road improvements and described as follows:

BEGINNING at a steel pin set marking the northwest corner of the herein described, said steel pin marking the division line of the lands of Woll on the north and the lands of Rashid on the south with the easterly line of Lime Ridge Road, thence along the said division line N 29° 59' 10" E 21.55 feet to the new easterly road line, thence southerly along the new road line S 6° 45' 20" W 173.30 feet and S 1° 26' 30" W 109.85 feet to a steel pin set marking the true southwest corner of the herein described parcel; thence through the lands of Rashid S 77° 54' 51" W 8.66 feet to the point on the old easterly road line of said Lime Ridge Road; thence along said old road line N 1° 26' 30" W 112.00 feet and N 6° 45' 20" W 154.16 feet to the point or place of beginning.

BEING the same premises conveyed by Victor A. Carella and Lena Carella to Abdul Rashid by deed dated August 9, 1974 and recorded in the Dutchess County Clerk's Office on August 12, 1974 in Liber 1389 of Deeds at page 703.

Appendix E—Decision Slip and Order of the New York Court of Appeals, Entered June 12, 1997

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION June 12, 1997

2-10 Mo. No. 412
Marine Midland Bank f/k/a Marine Midland Bank, N.A.,

Respondent,

V.

Abdul Rashid,

Appellant,

et al.,

Defendants.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of June 1997

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 412
Marine Midland Bank f/k/a Marine Midland Bank, N.A.,

Respondent,

v.

Abdul Rashid,

Appellant,

et al.,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

No. 97-448

Supreme Court, U.S.
FILED
OCT 9 1997
CLERK

IN THE

Supreme Court of the United States

October Term, 1997

ABDUL RASHID,

Petitioner,

v.

MARINE MIDLAND BANK f/k/a
MARINE MIDLAND BANK, N.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(3651 – 1997)

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PARTIES TO THE PROCEEDING.

The petition accurately lists the parties to the proceeding.

The following are parents of respondent Marine Midland Bank formerly known as Marine Midland Bank, N.A.:

HSBC Holdings, plc

HSBC Finance (Netherlands)

HSBC Holdings Bv.

HSBC Americas, Inc.

There are no non-wholly owned subsidiaries of respondent Marine Midland Bank formerly known as Marine Midland Bank, N.A.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 4

TABLE OF AUTHORITIES

CASES

Citibank N.A. v. Plapinger, 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974 (N.Y. 1985) 3

Hanrog Distributing Corp. v. Hanioti, 10 N.Y. Misc.2d 659, 54 N.Y.S.2d 500 (Sup. Ct. N.Y. County, 1945) 2

Mallad Construction Corp. v. County Federal Savings & Loan Association, 32 N.Y.2d 285, 344 N.Y.S.2d 925, 298 N.E.2d 96 (N.Y. 1973) 2, 3

S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp., 34 N.Y.2d 338, 357 N.Y.S.2d 478, 313 N.E.2d 776 (N.Y. 1974) 2

Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (N.Y. 1980) 2

STATUTES

New York General Obligations Law §15-301 3

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains many gross misstatements of fact. For instance, there is no evidence in the Record, and no argument was made below, that in February of 1990, the condominium project itself was intended to be the sole collateral (Pet. 4). There is simply nothing in the Record to support this newly made allegation.

Similarly, there is nothing in the Record to support the allegation now made that a "senior officer made various threats against petitioner" (Pet. 4). Petitioner was represented by counsel throughout the matter. The respondent Marine Midland Bank f/k/a Marine Midland Bank, N.A. (the "Bank") never forced petitioner to sign anything or do anything. Petitioner did nothing without extensive discussions with his own counsel and everything was through negotiations by his own counsel with the Bank and the Bank's counsel.

In November 1993, petitioner signed two mortgage modification agreements "in which [petitioner] reaffirmed the validity of the mortgage liens and agreed that there were no defenses nor offsets to the mortgages or the indebtedness secured thereby. [Petitioner] is bound by this waiver." (Decision and Order of Supreme Court, State of New York, Dutchess County, August 25, 1995, App. A to Pet. at 3A.)

Supreme Court, Dutchess County did not "reject consideration" of petitioner's evidence. On the contrary, Supreme Court, Dutchess County considered petitioner's evidence and held that it failed to raise a triable issue of fact.

The Appellate Division of the Supreme Court of the State of New York, Second Department adopted Judge Beisner's decision without modification. The Court of Appeals of the

State of New York declined to disturb either determination. This Court should do the same.

REASONS FOR DENYING THE WRIT.

Summary judgment is an important procedural device designed to separate those cases in which there are no material issues of fact from those cases in which testimony and other evidence is necessary to enable the finder of fact to resolve material issues of fact. *Mallad Construction Corp. v. County Federal Savings and Loan Assoc.*, 32 N.Y.2d 285, 291, 344 N.Y.S.2d 925, 930, 298 N.E.2d 96 (N.Y. 1973). More is required to defeat a motion for summary judgment than the unsupported recitation of facts which if believed would create a "shadowy semblance of an issue". *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 34 N.Y.2d 338, 357 N.Y.S.2d 478, 313 N.E.2d 776 (N.Y. 1974) quoting *Hanrog Dist. Corp. v. Hanioti,* 10 N.Y. Misc.2d 659, 660, 54 N.Y.S.2d 500 (Sup. Ct. N.Y. County, 1945). Rather, the burden on the party opposing the motion for summary judgment, once the movant has established a *prima facie* case, is to "lay bare its proofs". *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (N.Y. 1980).

Petitioner did not, and does not, claim that he did not receive adequate notice of the motion. Petitioner did not, and does not, claim that he was prevented from obtaining evidence in discovery which would have enabled him to establish, by admissible evidence, a material question of fact. Indeed, no discovery demands had been served by petitioner at the time of respondent's summary judgment motion.

As the motion court held, petitioner waived, under advice of counsel, and supported by consideration, any claims arising out of conduct alleged to have occurred prior to November, 1993. The Statute of Frauds, embodied in New York General Obliga-

tions Law §15-301, the Parol Evidence Rule and equitable principles of estoppel each render inadmissible petitioner's efforts to establish a "triable issue of fact by admissible evidence." *Citibank N.A. v. Plapinger,* 66 N.Y.2d 90, 495 N.Y.S.2d 309, 485 N.E.2d 974 (N.Y. 1985); *Mallad Constr. Corp., supra.*

If every summary judgment motion decided in favor of the movant were such as would rise to the level of a constitutional denial of due process, simply because the losing party was denied a trial, the entire procedural device known as the motion for summary judgment would be rendered useless. The Courts would be utterly clogged with trials containing no material questions of fact, and likely no material admissible testimony. In the instant case, all of petitioner's efforts to establish the conduct set forth in petitioner's Statement of the Case would have been and are inadmissible under the Parol Evidence Rule and Statute of Frauds. *Citibank, N.A. v. Plapinger, supra*; New York General Obligations Law §15-301.

The Petition presents no Constitutional question whatsoever. The proceedings below were regular in every regard, and the Petition should be denied.

CONCLUSION

For the reasons stated above, the Petition for a writ of certiorari should be denied. In the event that the Petition is granted, respondent urges that the order of the Appellate Division, Second Department be upheld.

DATED: Poughkeepsie, New York
October 7, 1997

Respectfully submitted,

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OF COUNSEL:
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* COUNSEL OF RECORD

FILED
OCT 15 1997
CLERK

No. 97-448 (3)

IN THE

Supreme Court of the United States

October Term, 1997

ABDUL RASHID,

Petitioner,

against

MARINE MIDLAND BANK f/k/a
MARINE MIDLAND BANK, N.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Authorities ii

I 1

II 2

Conclusion 4

TABLE OF AUTHORITIES

Page

Cases:

310 South Broadway Corp. v. Barrier Gas Service, Inc., 224 A.D.2d 409, 637 N.Y.S.2d 765 (2d Dept. 1996) 4

Citibank N.A. v. Plapinger, 66 N.Y.2d 90, 495 N.Y.S.2d 309 (1985) 3

GTE Automatic Electric Inc. v. Martin's Inc., 127 A.D.2d 545, 512 N.Y.S.2d 107 (1st Dept. 1987) 3

Maynard Court Owners Corp. v. Rentoulis, ___ A.D.2d ___, 652 N.Y.S.2d 664 (3d Dept. 1997) 3

Nassau Trust Co. v. Montrose Concrete Products Corp., 56 N.Y.2d 175, 415 N.Y.S.2d 663 (1982) 4

Sabo v. Delman, 3 N.Y.2d 155, 164 N.Y.S.2d 714 (1957) ... 3

Sarcona v. DeGiamo, 226 A.D.2d 1143, 641 N.Y.S.2d 479 (4th Dept. 1996) 3

Statutes:

C.P.L.R. Rule 3214(b) 2

N.Y. General Obligations Law § 15-301 3

No. 97-448

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ABDUL RASHID,

Petitioner,

-against-

MARINE MIDLAND BANK f/k/a
MARINE MIDLAND BANK, N.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND DEPARTMENT

PETITIONER'S REPLY BRIEF

I

Contrary to the assertion in respondent's Statement of the Case, the statements in petitioner's Statement of the Case are all based on facts clearly stated in the record or which can be reasonably inferred from facts in the record. The allegations made in the petition are based on the record and were presented to the courts below, including the New York Court of Appeals.

II

Contrary to respondent's suggestion in its argument, petitioner was indeed prevented from obtaining evidence during discovery. When respondent's summary judgment motion was made discovery was outstanding and incomplete; this included demands for interrogatories and depositions. Pursuant to C.P.L.R. Rule 3214(b) disclosure was stayed when respondent moved for summary judgment. Counsel's affirmation in opposition to the motion for summary judgment stated that there was evidence in the files of respondent that would support petitioner's claims, and that petitioner was seeking discovery of that evidence.

While it is true that petitioner was represented by counsel, he was nevertheless coerced by respondent. The bank held hostage an overwhelming majority of petitioner's assets (his house, stock and the condominium project itself) which, as the record clearly shows, had been tendered as collateral pursuant to prior written agreements. The bank refused to release the house and stock when full payment was tendered for the bridge loan in accordance with the then current agreements and insisted on a new, modified loan agreement.

The bank, through excessive delays and other harmful conduct, tried to force petitioner into default and threatened to unilaterally liquidate the stock in its possession as collateral. Such liquidation would have created a large income tax liability for petitioner and, without access to any proceeds from such liquidation, petitioner would have been insolvent. The bank was fully aware of this as it had petitioner's personal financial statements.

The bank was in a position to make good on its threats. After almost a year of unsuccessful efforts by petitioner's counsel to have the bank abide by the existing agreement, petitioner was forced by the bank's coercive and fraudulent conduct to capitulate and sign the loan modification agreement.

With the bank in control of petitioner's assets, and refusing to abide by the existing agreement, petitioner had no option to terminate negotiations or obtain better terms without facing total financial ruin. The parties were not playing on a level playing field.

This is not a case like *Citibank, N.A. v. Plapinger,* 66 N.Y.2d 90, 495 N.Y.S.2d 309 (1985), cited by respondent. Here the economic and power disparity between the parties meant there were no negotiations between equals.

Contrary to respondent's assertion, the allegations made in support of petitioner's claims are provable and are not made inadmissible by the Parol Evidence Rule and the Statute of Frauds. The Parol Evidence Rule does not bar receiving evidence of fraudulent misrepresentation. *Sabo v. Delman,*3 N.Y.2d 155, 161, 164 N.Y.S.2d 714 (1957); *see, GTE Automatic Electric Inc. v. Martin's Inc.,* 127 A.D.2d 545, 546, 512 N.Y.S.2d 107 (1st Dept. 1987).

The allegations made by petitioner may be proved without violating N.Y. General Obligations Law § 15-301. *See, Maynard Court Owners Corp. v. Rentoulis,* __A.D.2d__, 652 N.Y.S.2d 664 (3d Dept. 1997); *Sarcona v. DeGiamo,* 226 A.D.2d 1143, 641 N.Y.S.2d 479 (4th Dept. 1996). At issue are the circumstances surrounding respondent's actions when the agreements between the parties were written and then revised, and its subsequent actions forcing petitioner into foreclosure.

Waiver, estoppel or partial performance are defenses to the statute of frauds. *See, Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 415 N.Y.S.2d 663 (1982); *310 South Broadway Corp. v. Barrier Gas Service, Inc.*, 224 A.D.2d 409, 637 N.Y.S.2d 765 (2d Dept. 1996).

As stated in the petition, the constitutional issue presented by petitioner is properly before this court.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted. In the event that the petition is granted, petitioner urges that the order of the Appellate Division, Second Department be reversed.

Dated: October 16, 1997

Respectfully submitted,

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